

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(WESTERN DIVISION)

C.A. No.: 2011-CV-30199

**ROBERT BAGG, DAVID CROTTY,
KATHLEEN GEISSE, CRYSTAL DILLON
and LESLIE JOHNSTON Individually and
on Behalf of All Other Persons Similarly
Situated,**

Plaintiffs,

v.

**HIGHBEAM RESEARCH, INC., THE
GALE GROUP, INC., and CENGAGE
LEARNING, INC.,**

Defendants.

**DECLARATION OF
PATRICK J. MARKEY**

I, Patrick J. Markey, hereby declare:

1. I have served as local counsel for the Defendants in the above-captioned action, *Robert Bagg et al. v. Highbeam Research, Inc., the Gale Group, Inc. and Cengage Learning, Inc.* (D. Mass. C.A. No. 2011-cv-30199), and respectfully submit this Declaration and the exhibits annexed hereto in support of Defendants' renewed motion to dismiss the First Amended Complaint. The contents of this Declaration are based upon personal knowledge.

2. On June 15, 2012, I sent an email to counsel for the Plaintiffs addressing the three issues raised by the Court in its Memorandum and Order, dated May 17, 2012, and attached to that email all available documents located by Defendants after they conducted a search for documents responsive to Plaintiffs' requests set forth in the Joint Status Report filed on May 31, 2012, namely, a Cengage corporate organizational chart, a certificate of merger, screenshots from the HighBeam Research, Inc. ("HighBeam") website from 2007

and 2008 showing the trial subscription registration process, and HighBeam User Agreements dated 2006, 2007 and 2008. A true and correct copy of said email and its attachments are annexed hereto as Exhibit 1.

3. On June 19, 2012, counsel for Plaintiffs forwarded to me in an email a screenshot of a portion of the trial subscription registration process on the Highbeam website dated February 15, 2011, a copy of the Highbeam User Agreement dated February 15, 2011, and a copy of Highbeam User Agreement dated October 29, 2010. Said email and its attachments are annexed hereto as Exhibit 2.

4. On July 11, 2012, counsel for Plaintiffs contacted me and proposed a voluntary transfer to the Northern District of Illinois that would protect Plaintiffs' claims from statute of limitations defenses. He also raised the possibility of the Plaintiffs dismissing their Massachusetts action and re-filing in the Northern District of Illinois if Defendants would agree to toll the running of the statute of limitations at the date on which the Massachusetts action was filed.

5. On July 13, 2012, I advised counsel for the Plaintiffs via email that Defendants had rejected their proposal. A true and correct copy of said email is annexed hereto as Exhibit 3.

6. In my July 13, 2012 email, I also asked Plaintiffs' counsel whether they wished to conduct further discovery pursuant the Court's Order of May 17, 2012.

7. In that same email, I also offered again that my clients would be willing to provide an affidavit in lieu of formal discovery if that course would be preferable to the Plaintiffs.

8. In my July 13, 2012 email, I also requested that counsel for the Plaintiffs advise me whether they required any further discovery of any type so that the Defendants could move forward on the Motion to Dismiss.

9. I never received a response to my July 13, 2012 email or any further request for informal or formal discovery.

10. Accordingly, on July 25, 2012, I sent a follow-up email to Plaintiffs' counsel asking whether the Defendants should read the failure of counsel for the Plaintiffs to respond to my July 13, 2012 email as an indication that the Plaintiffs did not wish to conduct any further discovery on the issues raised in the Court's Order of May 17, 2012. A true and correct copy of said email is annexed hereto as Exhibit 4.

11. I never received a response to my follow-up email of July 25, 2012.

12. Annexed hereto as Exhibit 5 is a true and correct copy of the Affidavit of Robyn Dougherty, sworn to on June 15, 2012. This is the affidavit referred to in the content of my email dated June 15, 2012, annexed here as Exhibit 1, and the affidavit I offered to Plaintiffs' counsel in my email dated July 13, 2012, annexed hereto as Exhibit 3.

Dated: August 16, 2012

/s/ Patrick J. Markey
PATRICK J. MARKEY, ESQ.